LIBRARY
SUPREME COURT U. S.

FILED
JUL 5 1968
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1076

ERNEST C. PICKENS,
Petitioner,

vs.

ARTHUR L. OLIVER, Warden, California State Prison at Folsom,
Respondent.

On Writ of Certiorari to the Supreme Court of California

PETITION FOR REHEARING

THOMAS C. LYNCH,
Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General of the State of California,
DERALD E. GRANBERG,
Deputy Attorney General of the State of California,
6000 State Building,
San Francisco, California 94102,
Telephone: 557-0357,
Attorneys for Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Preliminary statement	1
Argument	4
The change in law effected by this court in Bruton v. United States should not be afforded retroactive application	4
Conclusion	11

Table of Authorities Cited

	Pages
Bruton v. United States, 36 U.S.L.Week 4447 (May 20, 1968)	2, 4, 6, 7, 10, 11
Delli Paoli v. United States, 352 U.S. 232 (1957)	2, 3, 8, 10
Escobedo v. Illinois, 378 U.S. 478 (1964)	6
Gilbert v. California, 388 U.S. 263 (1967)	6
Johnson v. New Jersey, 384 U.S. 719	4, 5, 6, 7
Linkletter v. Walker, 381 U.S. 618 (1965)	4
Miranda v. Arizona, 384 U.S. 436 (1966)	6
Opper v. United States, 348 U.S. 84 (1954)	8, 10
People v. Aranda, 63 Cal.2d 518, 407 P.2d 265, 47 Cal.Rptr. 353 (1965)	7
People v. Charles, 66 Cal.2d 330, 425 P.2d 545, 57 Cal.Rptr. 745 (1967)	5, 7
People v. Chavez, 50 Cal.2d 778, 329 P.2d 907 (1958)	9
People v. Foote, 48 Cal.2d 20, 306 P.2d 803 (1957)	9
People v. Zammora, 66 Cal.App.2d 166, 152 P.2d 180 (1944)	9
Roberts v. Russell, 36 U.S.L.Week 3472	2
Stovall v. Denno, 388 U.S. 293 (1967)	4, 6
Tehan v. Shott, 382 U.S. 406 (1966)	4
United States v. Ball, 163 U.S. 662 (1896)	10
United States v. Wade, 388 U.S. 218 (1967)	6

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1076

ERNEST C. PICKENS,
Petitioner,

vs.

ARTHUR L. OLIVER, Warden, California State Prison at Folsom,
Respondent.

On Writ of Certiorari to the Supreme Court of California

PETITION FOR REHEARING

The respondent, Arthur L. Oliver, Warden, California State Prison at Folsom, and the real party in interest, the People of the State of California, respectfully petition under Rule 58 for a rehearing by this Honorable Court of the above entitled cause.

PRELIMINARY STATEMENT

We respectfully urge this Court in considering this petition for rehearing to bear in mind that the salient

issue involved in this case, the retroactivity of *Bruton v. United States,* 36 U.S.L.Week 4447 (May 20, 1968), was neither briefed nor argued. The Court's per curiam opinion here is not, of course, the definitive decision with respect to this issue. However, the definitive decision, *Roberts v. Russell,* 36 U.S.L.Week 3472, was similarly decided by this Court in a per curiam opinion which came down the same day. We also urge this Court to grant the petition of the State of Tennessee for a rehearing in that case.

We are appalled at the cavalier manner in which this Court has resolved an issue which results in so tremendous an impact upon the administration of justice, not only in the states but in the federal system. And we are stunned at the casual manner in which this Court dismisses the reliance of courts and prosecutors upon one of its recent decisions which not only found no constitutional impediment in the former procedure but which approved of its use in the federal system. The Court now says, "The element of reliance is not persuasive, for *Delli Paoli* has been under attack from its inception and many courts have in fact rejected it." *Roberts v. Russell, supra.* Must prosecutors and judges now select which other decisions of this Court they should discontinue reliance upon for fear that at some future time the Court will tell them their reliance was ill-conceived?

Delli Paoli was decided in 1957. The petitioner in this case was convicted of murder in California two years later in a trial in which a rule of evidence, similar to that sanctioned in *Delli Paoli,* was followed.

California's utilization of such a rule of evidence can be attributed in no small measure to the fact that in *Delli Paoli,* this Court, in its supervisory capacity over the federal courts, reiterated its approval of a similar rule of evidence. Under such circumstances we do not view it as unreasonable that California, at least until 1965, continued to rely on this Court's conclusion that jurors were capable of following limiting instructions.

Nor are the fears which we express concerning the impact of retroactivity mere rhetoric. At the very outset it is obvious that the defendants who would reap the benefit of a decision imposing retroactivity are those who have acted in concert with other individuals in the commission of the crime of which they stand convicted; those who have participated in gang activity or in criminal conspiracies.

Moreover, it is common knowledge that the prisoners who would derive the greatest benefit from a holding of compelled retroactivity are those felons under long-term sentence who have been confined for an extended period of time. It is these hardened and dangerous criminals whose cases would afford the least likelihood of a successful retrial. To require a general release of such prisoners who were tried under circumstances which this Court had approved as perfectly fair and reasonable would strike a devastating blow at the orderly administration of the criminal law. We submit that the confidence of the bench, the bar and the people in our system of justice would be severely and justifiably shaken by such a decision.

It is one thing for the Court to tell the judges and prosecutors of this Nation that a practice formerly sanctioned by this Court can no longer be considered fair and that they must henceforth conform to a new standard. It is quite another for the Court to tell those responsible for the administration of criminal justice not only that the former practice must be abandoned but that every conviction which occurred in reliance on it must be voided.

ARGUMENT

THE CHANGE IN LAW EFFECTED BY THIS COURT IN BRUTON v. UNITED STATES SHOULD NOT BE AFFORDED RETROACTIVE APPLICATION.

We respectfully urge that the new constitutional standard articulated in *Bruton v. United States,* 36 U.S.L.Week 4447, should be denied retroactive application. In several recent cases this Court has denied retroactive application to constitutional rules of criminal procedure established by innovative decisions which overruled cases sanctioning former practice. *Stovall v. Denno,* 388 U.S. 293 (1967); *Johnson v. New Jersey,* 384 U.S. 719 (1966); *Tehan v. Shott,* 382 U.S. 406 (1966); *Linkletter v. Walker,* 381 U.S. 618 (1965). The relevant considerations in determining whether such a newly adopted rule should be applied retroactively were succinctly stated in *Stovall v. Denno, supra,* at 296-97 as follows:

> " 'These cases establish the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make

> the rule prospective . . . where the exigencies of the situation require such an application" . . . .' *Johnson, supra,* 384 U.S., at 726-727. The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

We are persuaded that a weighing and a balancing of these three relevant considerations leads inevitably to the conclusion that *Bruton* should be denied retroactive application. We, along with the California Supreme Court, do not harbor "a belief that the former procedure created a great risk of convicting innocent defendants." *People v. Charles,* 66 Cal.2d 330, 333, 57 Cal.Rptr. 745, 425 P.2d 545 (1967). That this belief was not unreasonable draws some confirmation from the fact that it was shared by this Court until this year.

That it was the purpose of this Court in *Bruton* to enhance the reliability of the fact-finding process at trial is clear beyond question. But this conclusion in itself does not compel a retroactive application of the new doctrine. As the Court said in *Johnson v. New Jersey, supra,* 384 U.S. at 728-29:

> "Finally, we emphasize that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. . . . We are thus concerned with a question of probability and must take account,

among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial."

This Court then went on in *Johnson* to hold that the exclusionary rules articulated in *Escobedo v. Illinois,* 378 U.S. 478 (1964), and in *Miranda v. Arizona,* 384 U.S. 436 (1966), applied only to cases coming to trial after the respective dates of those decisions.

Similarly, in *Stovall v. Denno, supra,* this Court limited the applicability of the new exclusionary rule articulated in *United States v. Wade,* 388 U.S. 218 (1967), and *Gilbert v. California,* 388 U.S. 263 (1967), to lineups which were conducted prior to the date of those decisions. And it did so notwithstanding the fact that the new rule was one which went to the reliability of the fact-finding process at trial. In this regard, this Court said:

> "A conviction which rests on a mistaken identification is a gross miscarriage of justice. The *Wade* and *Gilbert* rules are aimed at minimizing that possibility by preventing the unfairness at the pretrial confrontation that experience has proved can occur and assuring meaningful examination of the identification witness' testimony at trial. Does it follow that the rules should be applied retroactively? We do not think so." *Stovall v. Denno,* 388 U.S. at 297.

Thus, in determining whether the rule pronounced in *Bruton* should be applied retroactively, this Court must first weigh the probabilities and determine the extent to which the former practice infected "the integrity of the truth-determining process at trial."

And in making that determination, this Court should "take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial." *Johnson v. New Jersey, supra,* at 729.

In 1965, the California Supreme Court in *People v. Aranda,* 63 Cal.2d 518, 47 Cal.Rptr. 353, 407 P.2d 265 (1965), established a state rule of practice which is essentially identical to the constitutional standard established by this Court in *Bruton.* It did so because it entertained grave constitutional doubts as to the validity of the former practice and because it considered the former practice as prejudicial and unfair to the non-declarant defendants. *People v. Aranda, supra,* 63 Cal.2d at 529.

However, when that same court subsequently determined whether the rule it established in *Aranda* should be given retroactive application, it concluded that the purposes of the new rule did not require its application to convictions which had become final. *People v. Charles, supra.* In so doing, it noted that its ruling in *Aranda* "did not stem from a belief that the former procedure created a grave risk of convicting innocent defendants." *People v. Charles, supra,* 66 Cal.2d at 333. The conclusion of the California Supreme Court that the former practice did not create a grave risk of convicting innocent defendants is eminently reasonable.

Under the former California practice appropriate limiting instructions had to be given whenever an extrajudicial statement admissible only against the

declarant was used in a joint trial. Indeed, as a matter of practice, such instructions would be given to the jury not only when they were formally instructed prior to their deliberation but also when the statement was introduced.

With respect to the ability of a jury to follow such limiting instructions, this Court said in *Opper v. United States*, 348 U.S. 84, 95 (1954):

> "The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. [Footnote omitted]. To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdit. Our theory of trial relies upon the ability of a jury to follow instructions."

To the same effect, this Court said in *Delli Paoli v. United States, supra*, at 242:

> "It is a basic premise of our jury system that the court states the law to the jury and the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice."

With regard to the impact which the former California practice may have had on the integrity of the fact-finding process at trial, it is also significant to note that the use of such statements in a joint trial was carefully circumscribed to avoid prejudice to the non-confessing codefendants. "Where, however, statements of a codefendant are admitted which are irrelevant or unnecessary in establishing a case against him and are extremely prejudicial and inadmissible hearsay as to a codefendant, they should be excluded from evidence." *People v. Foote,* 48 Cal.2d 20, 23, 306 P.2d 803 (1957). *See also, People v. Chavez,* 50 Cal. 2d 778, 790, 329 P.2d 907 (1958); *People v. Zammora,* 66 Cal.App.2d 166, 211-12, 152 P.2d 180 (1944).

We submit, therefore, that the former California practice was attended by effective safeguards which ensured the integrity of the truth-determining process at trial. Under these circumstances, the probability that this former practice resulted in any improper convictions is extremely small and furnishes little support for a decision imposing *Bruton* retroactively. Particularly so, when this limited probability is weighed against the prior justified reliance upon the old standard and the tremendous impact which retroactivity would have upon the administration of justice.

That reliance upon the old standard was justified and reasonable cannot be denied. Not only was our former state practice considered consistent with due process but it conformed to the rule of evidence consistently approved by this Court in its supervisory role over the federal courts prior to its decision this

year in *Bruton*. See e.g., *United States v. Ball*, 163 U.S. 662, 672 (1896); *Opper v. United States, supra; Delli Paoli v. United States, supra*. These decisions are operative facts and the consequential reliance upon them by state and federal courts and prosecutors cannot justly be ignored.

The newly defined constitutional right which now prohibits a trial procedure which previously had the express approval of this Court should not be applied retroactively. To do so would not only impose impossible burdens upon the administration of criminal justice, but would have a devastating effect upon the confidence of the bench, the bar and the general public in the courts. Judges and prosecutors would be compelled to speculate as to which other decisions by this Court they must discontinue reliance upon for fear that at some later point in time this Court will tell them their reliance was ill-conceived and the offender must be freed.

The beneficiaries of such a decision would of necessity be those who had acted in concert with other offenders; gang members and members of criminal conspiracies. Those prisoners who would derive the greatest benefit from a holding of compelled retroactivity are those felons under long-term sentences who have been confined over an extended period of time, since their cases would afford the least likelihood of a successful retrial. To require a general release of such prisoners would cripple the orderly administration of the criminal law. We respectfully submit that this Court should hold that the rule estab-

lished in *Bruton* is not available to retroctively attack a judgment of conviction.

CONCLUSION

For the foregoing reasons, we respectfully request that a rehearing be granted in this case so that the tremendously important issue involved may be appropriately briefed and argued before the question is resolved by this Court.

Dated, San Francisco, California,
July 2, 1968.

THOMAS C. LYNCH,
Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General of the State of California,
DERALD E. GRANBERG,
Deputy Attorney General of the State of California,
Attorneys for Respondent.